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Change of Venue and Change of Judge in a Civil Action in Indiana: Proposed Reforms

CHANGE OF VENUE AND CHANGE OF JUDGE IN A CIVIL ACTION IN INDIANA: PROPOSED REFORMS

The theory underpinning Indiana's change of venue and change of judge provisions is that a litigant is entitled to a change of venue or a

change of judge when such is necessary to preserve the litigant's right to a fair trial.[1] In practice, however, court interpretations of the statutory provisions in conjunction with Indiana Supreme Court rules have eroded away this underlying rationale and have made it possible for a litigant to gain a change of venue or a change of judge independent of the question of whether such a change is necessary to preserve the right to a fair trial. As the statute is now interpreted a litigant need only file a timely unverified application for a change of venue or a change of judge[2] in order to place a duty on the trial judge to grant the change. The moving party, not the trial judge, determines the necessity of the change and as a result highly objectionable dilatory tactics are possible, since a moving litigant can secure either change with a view to gaining additional time when a change is not necessary.[3] It is suggested that the motion for change of venue and change of judge be reformed so as to preserve the litigant's right to a fair trial without at the same time permitting the moving litigant to abuse the motion and delay the proceedings.

I. History of Change of Venue and Change of Judge Statutes in Indiana

The first statute which is important to the contemporary change of venue—change of judge problem is the statute of 1852.[4] Although the 1852 statute was limited to change of venue, it is significant because the statutory grounds for seeking a change of venue which it promulgated are substantially identical to the grounds that enable a litigant to gain a change of venue under the present change of venue—change of judge statutes. The 1852 statute provided for a change of venue in a civil action when: (1) the judge had been engaged as counsel in the cause prior to his election or appointment as judge, or was otherwise interested in the cause; (2) the opposite party had an undue influence over the citizens of the county; (3) and odium attached to the applicant or to his cause of action or defense, because of local prejudice; (4) the county was a party or (5) the convenience of the witnesses and the ends of justice would be promoted.[5]

The 1852 change of venue statute was construed in 1855 in *Witter v. Taylor*[6] to place a duty on the trial court judge to grant the change if

1. See Crumpacker, *The Change of Venue Problem,* 20 Ind. L.J. 283 (1945).
2. See Rules Sup. Ct. Ind. 1-12B.
3. See 23 Ind. L.J. 1, 6 (1947).
4. 2 Ind. Rev. Stat. 1852, § 207. The earliest change of venue statute in Indiana was adopted in 1813 before Indiana became a state. See Ind. Acts 1813, ch. 6.
5. 2 Ind. Rev. Stat. 1852, § 207.
6. 7 Ind. 110 (1855).

the application was ". . . in substantial conformity to the statute." The *Witter* case established the right of a litigant to a change of venue when a statutory cause was alleged and a timely affidavit was filed. The court reached its significant and lasting interpretation of the change of venue statute of 1852 by construing the word "may" in the introductory language of the statute to be explicitly and clearly imperative and not discretionary. Hence, according to this interpretation, the judge had a legal duty to change the venue on proper application by a party, and it was not within his discretion to deny the motion if he should determine that such a change was not necessary in order to have a fair trial.

In 1881 the Indiana legislature adopted a new statute for both change of venue and change of judge[8] and it is in effect today, viz., section 2-1401.[9] The introductory language is the same as that used in the 1852 change of venue statute except for the substitution of the word "shall" for the word "may." The introduction to section 2-1401 now reads, "The court . . . shall change the venue of any civil action upon the application of either party. . . ."[10] The Indiana Supreme Court in 1885 in the case of *Burkett v. Holman*[11] stated that, "The language of this section of the civil code is mandatory and there can be no doubt that, in any civil action, when the proper affidavit is made and filed by the proper party, at the proper time, the court . . . must grant the change of venue or change of judge."

As a general rule the word "may" in a statute is permissive, operating to confer discretion,[12] whereas the word "shall" is mandatory.[13] These words, however, are frequently used interchangeably in statutes without regard to their literal meaning.[14] The fact that the legislature used the word "shall" in the 1881 statute would seem to indicate that it intended to adopt the prior judicial construction of the *Witter* case, namely, that the provision was mandatory. Thus the court in the *Burkett* case could rely on the literal meaning of the word "shall" in construing the change of venue and change of judge statute of 1881 as mandatory.

Only the cause permitting a change of venue for convenience of the witnesses and ends of justice[15] resisted the mandatory interpretation set

7. *Id.* at 111.
8. See Ind. Laws Spec. Sess. 1881, ch. 38, § 255.
9. IND. ANN. STAT. § 2-1401 (Burns 1946).
10. *Ibid.*
11. 104 Ind. 6, 8, 3 N.E. 406, 408 (1885).
12. See 82 C.J.S., *Statutes* § 10 (1953).
13. See State *ex rel.* City of Indianapolis v. Brennan, 231 Ind. 492, 109 N.E.2d 409 (1952).
14. See State *ex rel.* Smitherman v. Davis, 238 Ind. 563, 151 N.E.2d 495 (1958).
15. See IND. ANN. STAT. § 2-1401 (Burns 1946).

forth in the *Witter* and *Burkett* cases. In the same year *Burkett* was decided, the Indiana Supreme Court in *Riggenberg v. Hartman*[16] held that the trial court has discretionary power to grant or refuse the change when the convenience of witnesses and ends of justice are the basis for the change. The *Riggenberg* holding, however, is not difficult to explain when the language of the cause is closely examined. The same introductory language construed as mandatory in the *Burkett* case is used, but the language of the cause itself indicates that the trial court is to exercise discretion in changing the venue. The introduction and the cause together read, "The court . . . shall change the venue of any civil action upon the application of either party . . . *showing to the satisfaction of the court* that the convenience of witnesses and the ends of justice would be promoted by the change. . . ."[17] Although this interpretation of the convenience of witnesses and ends of justice cause has not been considered on the appellate level since 1885, presumably the trial judge would still have discretion in ruling on a change of venue if this cause for changing is alleged.

Although the 1881 statute represents the modern expression of a statute encompassing both change of venue and change of judge, in 1859 the Indiana legislature first expanded the 1852 change of venue statute to permit a change of judge without changing the county. The literal meaning of "change of venue" includes only changing the place of the trial from one county or district to another.[18] Obviously changing the county accomplishes a change of trial judge, but it is not necessary in every case to change both the trial judge and the county to insure a fair trial. Therefore, in 1859 the 1852 statute became a change of venue and change of judge statute under which certain causes could be used to change the judge and certain causes could be used to change the county.[19]

Under the 1859 statute the judge could be changed when he was: (1) engaged as counsel; (2) of kin to either party; (3) a material witness or (4) biased, prejudiced, or interested in the cause. The remaining causes under the 1859 change of judge and change of venue statute—undue influence or odium attaching due to local prejudice, the county being a party and convenience of the witnesses and the ends of justice[20]—could only be used to change the place of trial. Each of the

16. 102 Ind. 537, 26 N.E. 91 (1885) (still authority on discretionary change of venue in convenience of witnesses and ends of justice cause, although overruled on other grounds).
17. IND. ANN. STAT. § 2-1401 (Burns 1946).
18. Crumpacker, *supra* note 1, at 283.
19. See Ind. Laws 1859, ch. 85, §§ 207, 208.
20. Ind. Laws 1859, ch. 85, § 208.

causes under the statute of 1859 was exclusive in that they could only be used for changing the judge or changing the county, but they could not be used for both purposes.

The change of judge and change of county distinction and the exclusive character of each of the causes have remained substantially unchanged and are embodied in section 2-1401, the present change of venue—change of judge statute. Today undue influence or odium due to local prejudice, the county being a party or the convenience of the witnesses and the ends of justice causes may still only be used to change the county.[21] By negative implication the other causes set out in section 2-1401 may only be used to change the judge. There is, however, no longer an express statutory provision restricting these causes to changing the judge and theoretically a court could also permit a change of county when they are alleged.

II. Demise of the Affidavit

Historically the affidavit has been an integral part of securing a change of venue or a change of judge. The change of venue statute of 1824[22] required the petitioner's application to be supported by an affidavit, and the affidavit requirement continued until 1955 when the Indiana Supreme Court in promulgating rule 1-12B[23] provided that a party need only file an unverified application.

Indiana Supreme Court Rule 1-12B, in requiring only an unverified application, is inconsistent with the contemporary Indiana change of venue and change of judge statute which still requires an ". . . application of either party, made upon affidavit . . ." and therefore, a critical question is raised about the source of the supreme court's rule-making power. If the supreme court has the inherent right to formulate rules of court in accordance with the doctrine of separation of powers, then statutes which conflict with those rules would be superseded by the rules so formulated.[24] If on the other hand, however, the court received its rule-making power by a specific grant of the legislature,[25] then the court's

21. See Ind. Ann. Stat. § 2-1406 (Burns 1946).
22. Ind. Rev. Laws 1824, ch. 115, § 1.
23. Rules Sup. Ct. Ind. 1-12B.
24. See Note, 36 Ind. L.J. 87 (1960).
25.
> The Supreme Court shall have the power to adopt, amend, and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter *all laws in conflict therewith shall be of no further force or effect.*

Ind. Ann. Stat. § 2-4718 (Burns 1946) (emphasis added); see State *ex rel.* Cox v. Superior Court, 233 Ind. 531, 121 N.E.2d 881 (1954).

power to act would be impliedly revoked when the legislature subsequently acts in an area. The complexities of this controversy do not lend themselves to simple solution,[26] but since the legislature enacted the statute giving the Indiana Supreme Court rule-making power subsequent to the enactment of section 2-1401, it is persuasive to contend that the legislature intended to surrender its authority in the change of venue—change of judge area to the court and that Indiana Supreme Court Rule 1-12B controls the affidavit problem.[27]

Irrespective of the Indiana Supreme Court's power to do so, however, its reason for omitting the affidavit requirement is questionable. Because of the court's interpretation of the change of venue—change of judge statute, the affidavit was the only method in Indiana for preventing a change when in fact a statutory cause did not exist. Thus, by deleting the requirement of the affidavit, the court has removed an important safeguard against abuse of the motion for a change of venue or change of judge. It is now possible for a party's lawyer, with or without the party's consent, to file an unverified application without fear of perjury or reprisal for false allegations. In short, the demise of the affidavit has made it more practical for counsel to use a motion for a change of venue or a change of judge as a dilatory device.

III. Current Provisions for Change of Venue and Change of Judge in Indiana and Other Jurisdictions

In Indiana the mechanics for changing venue or changing the judge in a civil action are set forth in supreme court rule 1-12B.[28] A party or

26. The supreme court's rule-making power has been the subject of considerable law review attention. See Gavit, *The New Federal Rules and Indiana Procedure,* 13 Ind. L.J. 203, 299 (1938); Ridgely, *The Indiana Rule Making Act,* 13 Ind. L.J. 1 (1937); Note, 36 Ind. L.J. 87 (1960); Note, *The Indiana Rule Making Bill,* 12 Ind. L.J. 317 (1937).

27. The change of venue and change of judge statute was enacted in 1881. See Ind. Ann. Stat. § 2-1401 (Burns 1946) which was enacted in Ind. Laws Spec. Sess. 1881 ch. 38, § 255. The rule making power was granted in 1937. See Ind. Ann. Stat. § 2-4718 (Burns 1946) which was enacted in Ind. Acts 1937, ch. 91.

28.

> In all cases where the venue of a civil action may now be changed from the judge or the county, such change shall be granted upon the filing of an unverified application or motion therefore by a party or his attorneys: Provided, however, a party shall be entitled to only one change from the county and only one change from the judge.
>
> In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for change of judge or change of venue shall be filed not later than ten (10) days after the issues are first closed on the merits or if the issues are closed without answer by operation of law, or where a cause is remanded for a new trial by the Appellate or Supreme Court, not later than ten (10) days after the party has knowledge the cause is ready to be set for trial. Provided, that in

his attorney may secure a change by filing an unverified application or motion ". . . in all cases where the venue of a civil action may now be changed from the judge or the county." Rule 1-12B does not make specific reference to section 2-1401, the statute which provides the change of venue—change of judge causes, but it is assumed that the language "in all cases where the venue of a civil action may now be changed . . ." refers to section 2-1401 since the latter is the only provision which indicates causes for a change of venue or judge.[29]

With one exception, it is well established that a party or his attorney on proper and timely filing of an application for change of venue or change of judge has a right to the change.[30] The court acts in a ministerial capacity[31] and the act of granting the change is not discretionary, the judge having the duty to grant it.[32] The applicant may compel the judge to grant the change by mandamus if the motion is not sustained after proper and timely filing.[33] The exception, although there is no case

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event an application for a change of judge or change from the county is granted within said ten (10) day period, a request for a change of judge or county may be made by a party still entitled thereto within ten (10) days after the special judge has qualified or the moving has knowledge the cause has reached the receiving county or there has been a failure to perfect the change. . . .

RULES SUP. CT. IND. 1-12B.

29. Prior to the adoption of rule 1-12B authority indicated that an application for a change of county or change of judge must set forth one of the causes enumerated in the statute. For change of county, see, *e.g.*, State *ex rel.* Young v. Niblack, 229 Ind. 509, 99 N.E.2d 839 (1951); State *ex rel.* Neal v. Superior Court, 202 Ind. 456, 174 N.E. 732 (1951). For change of judge, see, *e.g.*, State *ex rel.* Thompson v. Rhoads, 224 Ind. 136, 65 N.E.2d 248 (1946); Conklin v. School City, 73 Ind. App. 25, 125 N.E. 464 (1919); Palmer v. Poor, 121 Ind. 135, 22 N.E. 984 (1889).

30. For change of county see, *e.g.*, State v. Laxton, 178 N.E.2d 901 (Ind. 1962); State *ex rel.* Bradshaw v. Probate Court, 225 Ind. 268, 73 N.E.2d 769 (1947); State *ex rel.* Burdge v. Cummings, 208 Ind. 292, 95 N.E. 870 (1935). For change of judge see, *e.g.*, State *ex rel.* Burkholder v. Probate Court 238 Ind. 103, 148 N.E.2d 561 (1958); State *ex rel.* Gmil v. Markey 230 Ind. 68, 101 N.E.2d 707 (1951); Dowd v. Harmon 229 Ind. 254, 96 N.E.2d 902 (1951).

31. For change of county see, *e.g.*, State *ex rel.* Lindsey v. Beavers, 225 Ind. 308, 75 N.E.2d 660 (1947); Moore v. American Nat'l Bank, 114 Ind. App. 551, 52 N.E.2d 513 (1944). For change of judge, see, *e.g.*, Dowd v. Harmon, 229 Ind. 254, 96 N.E.2d 902 (1951); State *ex rel.* Roth v. Dickey, 225 Ind. 279, 73 N.E.2d 765 (1947); State *ex rel.* Ballard v. Circuit Court, 225 Ind. 174, 73 N.E.2d 489 (1947).

32. For change of county see, *e.g.*, State *ex rel.* Lindsey v. Beavers, *supra* note 31; State *ex rel.* Bradshaw v. Probate Court, 225 Ind. 268, 73 N.E.2d 769 (1947); State *ex rel.* Smith v. Chambers, 211 Ind. 640, 6 N.E.2d 950 (1937). For change of judge see, *e.g.*, State *ex rel.* Gmil v. Markey, 230 Ind. 68, 101 N.E.2d 707 (1951); Dowd v. Harmon, *supra* note 31; State *ex rel.* Ballard v. Circuit Court, *supra* note 31.

33.

Such writs of mandate may issue out of the Supreme Court to the circuit, superior, criminal, probate, juvenile and municipal courts of this state, respectively, compelling the performance of any duty enjoined by law . . . including the granting of *changes of venue from the county* in cases where such change of venue is allowed by law.

IND. ANN. STAT. § 3-2201 (Burns Supp. 1962) (emphasis added). For change of county see State *ex rel.* Lindsey v. Beavers, 225 Ind. 308, 75 N.E.2d 660 (1947); State *ex rel.*

on the point, would seem to be the previously indicated situation in which a change of venue is requested for the convenience of witnesses and the ends of justice. Under the authority of *Riggenberg v. Hartman*,[34] a court acts in a discretionary, rather than a ministerial capacity in granting a change when such a statutory ground is alleged and it may therefore be presumed that a moving litigant would have no recourse to mandamus when change is denied.[35]

When an application is made, the normal delay in securing the change, which is contemplated by the statute,[36] will occur whether a statutory ground exists or not. Only counsel's sense of fair play prevents the allegation of a cause which is known not to exist. This means that a party or his attorney by a proper and timely application can require the county to suffer an unnecessary loss of time and expense[37] in changing the trial judge or the county. The only restriction on a party's use of the motion is that he may not have more than two changes, viz., one change from the county and one from the judge.[38]

The provisions for obtaining a change of county or a change of judge after the appropriate time limit has elapsed are somewhat different than for change based on a timely application. Rule 1-12B provides that if the applicant first obtains knowledge of the cause after the time for filing has expired, he may file a personally verified application specifically alleging when the cause was first discovered and how it was discovered. The applicant must set out the facts showing the cause and he must explain why the cause could not have been discovered before by the

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Bradshaw v. Probate Court *supra* note 32. For change of judge see, *e.g.*, State *ex rel.* Beekham v. Circuit Court, 233 Ind. 368, 119 N.E.2d 713 (1954); State *ex rel.* Wheeler v. Feathers, 197 Ind. 97, 149 N.E. 900 (1925).

34. 102 Ind. 537, 26 N.E. 91 (1885).

35. Writs of mandate may be used only to compel the performance of *duty*. IND. ANN. STAT. § 3-2201 (Burns Supp. 1962).

36. In changing the county a party automaticalliy has the following periods within which to perfect his change. The trial may not progress until these periods have elapsed. Ten days after the issues are closed filing is required. There are three days in which to agree on a county, after which the court must, within two days, submit a list of counties. The parties have up to fourteen days to strike. The party after filing may delay nineteen days before striking. Then there is a period in which the papers are transferred and the cause redocketed in a new county. The total delay could easily exceed a month. See RULES SUP. CT. IND. 1-12B.

37. IND. ANN. STAT. § 2-1417 (Burns Supp. 1962) provides that:

> In all cases, civil or criminal or otherwise, where there has been or shall be a change of venue from one county to another the county in which such cause . . . shall have originated and from which such change shall be taken shall pay to the county to which change of venue has been or shall be taken all such expenses as shall have been or shall be incurred by the county to which said change of venue shall be taken. . . .

See also IND. ANN. STAT. § 2-1416 (Burns Supp. 1962).

38. See RULES SUP. CT. IND. 1-12B.

exercise of due care and diligence. The opposing party may file a counter affidavit within ten days. The judge then has discretion in ruling on the motion and his ruling may only be reviewed for abuse of discretion.[39] The judge, therefore, is no longer a conduit through which motions for change pass unhampered by discretion,[40] since the change of venue or change of judge, if untimely, is not considered an absolute right necessary to insure a fair trial.

To appreciate the possible delay when the venue is changed it is necessary to examine the method of change. Rule 1-12B and section 2-1408 both specify how a venue shall be changed from the county in a civil case once a motion for change has been granted. The parties have three days to agree upon the county and if agreement is reached the court must transfer the action to that county. In the absence of agreement the court must, within two days, submit a written list of the adjoining counties to the parties. Rule 1-12B and section 2-1408,[41] however, conflict on the method which must be used in striking the counties; rule 1-12B requires the parties to alternately strike the counties within seven days or a period not to exceed fourteen days which the court will fix and section 2-1408 requires the parties to strike the counties within two days. The county not stricken will be the place for the trial of the case. If the moving party does not strike within the appropriate time, section 2-1408 provides that the clerk of the court will strike for him, but rule 1-12B provides that the moving party waives the right to a change of county, and the original court reassumes general jurisdiction of the cause of action. If the non-moving party fails to strike within the proper time the clerk will strike for him.

The overlap and conflict between rule 1-12B and section 2-1408 on the question of the mechanics for changing the county create doubt as to which provision should prevail.[42] The rule was adopted in 1955 and amended in 1958, while the statute was adopted in 1929 and amended in 1961.[43] Although it would seem that the 1961 amendment to section 2-1408 would imply that the legislature intended to control change of venue mechanics, even without resolution of this power question, it is

39. *Ibid.*

40. See State *ex rel.* Botkin v. Court, 240 Ind. 261, 162 N.E.2d 611 (1960). (There is no action for writ of mandate and prohibition when a trial judge rules on an untimely application for change of venue).

41. IND. ANN. STAT. § 2-1408 (Burns Supp. 1962).

42. The Indiana supreme court held that the right to change the judge is a substantive right which can be conferred only by the legislature, while the method and time for asserting the right is procedural and subject to the courts rule making power. State *ex rel.* Blood v. Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959).

43. See IND. ANN. STAT. § 2-1408 (Burns Supp. 1962) as amended by Ind. Acts 1961, ch. 297, § 1.

apparent that either rule 1-12B or section 2-1408 allows a substantial delay in a trial.

The machinery for selecting a special judge also delays the trial. Rule 1-12B[44] purports to be the "exclusive manner" of selecting a special judge. If the parties cannot agree on an appointee, they can consent to the selection and appointment of a special judge by the judge before whom the action is pending. In the absence of agreement or consent by the parties, the presiding judge submits a list of three persons from whom an appointee may be selected by striking. Any regular judge of a circuit, superior, criminal, probate or juvenile court, or any member of the bar is eligible for appointment.

In other jurisdictions there are three contemporary views on a litigant's right to change the county or change the judge when a proper and timely application is filed. The majority of states do not give a party an absolute right to a change, but rather give the judge discretion in granting the change of judge or county regardless of the grounds for change alleged.[45] The judge's ruling on a motion to change the judge or to change the county will not be overturned on appeal unless there has been an abuse of discretion. The judge considers whether the facts alleged constitute a statutory cause in determining whether a change should be granted. Particularly in the case of a motion for a change of judge, the issue is to be determined on the basis of evidence[46] or counter-affidavits.[47] If bias of the judge is alleged another judge may be called in to hear the charge.[48]

The federal courts are generally included with the majority. A federal district court in its discretion can transfer any civil action to any

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44. RULES SUP. CT. IND. 1-12.

45. See, *e.g.*, McMichael v. Harris, 127 Fla. 861, 174 So. 323 (1937); Moscoe Vets Club v. Bishop, 69 Idaho 350, 207 P.2d 503 (1949); Peel v. Branblett, 305 Ky. 577, 204 S.W.2d 565 (1947); State *ex rel.* Ward v. District Court, 200 Minn. 632, 274 N.W. 632 (1937); O'Shields v. Caldwell, 208 S.C. 245, 37 S.E.2d 665 (1946); Texas & N.O.R. Co. v. Wilkerson, 260 S.W.2d 912 (Tex. Civ. App. 1953).

46. See, *e.g.*, Benson v. Elmore, 254 Ala. 47, 47 So.2d 180 (1950); Bass v. Minick, 194 Ark. 589, 109 S.W.2d 139 (1937); *In re* Buchaman's Estate, 132 Cal. App. 2d 81, 281 P.2d 608 (1955); Thomas v. Prudhomme, 163 La. 140, 111 So. 654 (1927); Mahlen Land Corp. v. Kurtz, 355 Mich. 340, 94 N.W.2d 888 (1959); Cashen v. Murphy, 138 Miss. 853, 103 So. 787 (1925); 536 Broad Street Corp. v. Valco Mortg. Co., 135 N.J. Eq. 581, 39 A.2d 700 (1944) *aff'd* 136 N.J. Eq. 513, 42 A.2d 704 (1944); *In re* Crawford's Estate, 307 Pa. 102, 160 Atl. 585 (1931); Taylor v. Batte, 145 S.W.2d 1116 (Tex. Civ. App. 1940).

47. See, *e.g.*, Hendrickson v. Superior Court, 85 Ariz. 10, 330 P.2d 507 (1958); Ryan v. Welte, 87 Cal. App. 2d 888, 198 P.2d 351 (1948) (where the trial judge files a counter-affidavit).

48. See, *e.g.*, Neblett v. Pacific Mut. Life Ins. Co., 22 Cal. 2d 393, 139 P.2d 934 (1934); Succession of Watson, 18 So. 2d 233 (La. Ct. App. 2d Cir. 1943); Tumbleson v. Noble, 109 Ohio App. 242, 164 N.E.2d 808 (1959); *In re* Crawford's Estate, 307 Pa. 102, 160 Atl. 585 (1931).

other district[49] where it could have been brought originally, if the convenience of the parties and witnesses or the interest of justice would be furthered.[50] A federal district judge can be changed when a party files a timely and sufficient affidavit that the judge has a personal bias or prejudice. The affidavit must be filed at least ten days before the beginning of the term at which the proceeding is to be heard, along with a certificate of counsel stating that the affidavit is made in good faith.[51] The trial judge then has discretion to determine whether the facts alleged are legally sufficient and constitute "personal bias."[52]

A hybrid view is taken in a few states which recognize an absolute right to change the county when certain specific statutory causes are alleged, but do not recognize the same right when other statutory causes are alleged.[53] Indiana might be placed in this category because *Riggenberg v. Hartman* gives the judge discretion when ruling on a motion to change the county for the convenience of the witnesses and the ends of justice. Indiana, however, in all causes but convenience of the witnesses and ends of justice, recognizes an absolute right to a change of county or a change of judge. Therefore, it would seem more properly placed in a third category with a minority of states that require the judge to grant a change of venue[54] or a change of judge[55] where the application is timely and proper. These states recognize an absolute right in a litigant to have a change of county or a change of judge.

IV. Suggested Reforms in Change of Venue and Change of Judge in Indiana

The Right to Change. As has been indicated, Indiana guarantees a party the right to change the judge or county if timely application is made,

49. See Southern Ry. v. Madden, 235 F.2d 198 (4th Cir. 1956) *cert. denied* 352 U.S. 953.

50. See 28 U.S.C. § 1404 (1958).

51. See 28 U.S.C. § 144 (1958).

52. Berger v. United States, 255 U.S. 22 (1920).

53. See, *e.g.*, San Jose Ice & Storage Co. v. City of San Jose, 19 Cal. App. 2d 62, 65 P.2d 1324 (1937); Willison v. Davidson, 249 Iowa 1104, 90 N.W.2d 737 (1958); Johnson v. Clark, 131 Mont. 454, 311 P.2d 722 (1957); Greenspan Bros. Co. v. Collins, 122 N.J.L. 234, 5 A.2d 52 (1939); Kanipe v. Kendrick, 204 N.C. 705, 169 S.E. 188 (1933); South Texas Dev. Co. v. Williams, 130 Tex. 217, 107 S.W.2d 378 (1937); State *ex rel.* Saylesville Cheese Mfg. Co. v. Zimmerman, 220 Wis. 682, 265 N.W. 856 (1936).

54. See, *e.g.*, Agar Packing & Provision Corp. v. United Packinghouse Workers of America, 311 Ill. App. 502, 36 N.E.2d 750 (1941); Ralston v. Ralston, 166 S.W.2d 235 (St. Louis Ct. App. 1942); Little v. Wyoming County, 214 Pa. 596, 63 Atl. 1039 (1906).

55. See, *e.g.*, Hendrickson v. Superior Court, 85 Ariz. 10, 330 P.2d 507 (1958); Davis v. Irwin, 65 Idaho 77, 139 P.2d 474; State *ex rel.* Montana State Univ. v. District Court, 132 Mont. 262, 317 P.2d 309 (1957); State *ex rel.* Stokes v. Second Judciial District, 55 Nev. 115, 27 P.2d 534 (1933); State *ex rel.* Mauerman v. Superior Court, 44 Wash. 2d 828, 271 P.2d 435 (1954); *In re* Hill's Estate, 272 Wis. 197, 75 N.W.2d 582 (1956).

the rationale being that a party is assured of a fair trial before an impartial judge or jury. Only an attorney's integrity or sense of fair play prevents the allegation of a statutory cause which does not exist. To falsely allege a cause could be called an abuse of the statute, but the statute seemingly contemplates no sanction or penalty for doing so. Also, now that rule 1-12B no longer requires an affidavit with the application, perjury for a false allegation is not a deterrent.

Those who strongly support Indiana's present provisions for change of county and change of judge are willing to permit abuse or an undesirable use of the provisions in order to preserve the basic right to a fair trial and suggest that the disadvantages suffered are necessary to preserve the all important right of fair trial.[56] Giving the trial judge discretion to rule on a motion for a change of county or change of judge, however, does not seriously endanger a party's right to a fair trial. The judge should be able to fairly examine the facts on which the motion is based, for only in this way will unnecessary delay be avoided. If the judge abuses his discretion on the basis of the facts shown, his ruling is subject to reversal on appeal. The remote possibility that an abuse of discretion will not be checked on appeal does not justify the unnecessary delay which results when the venue or judge is changed on the basis of a false allegation of a statutory cause.

The proponents of the Indiana system contend that if a judge is given discretion in granting change motions, a party who moves to change the judge on the grounds of bias, prejudice or interest will not get an impartial ruling.[57] It is true that a trial judge might tend to assume he is not biased in the face of facts to the contrary, but a motion based on this ground could be ruled on by another judge. Bias and prejudice, however, is the only cause under section 2-1401 which requires the judge to personally assess his qualities and therefore, when any other cause is alleged, a trial judge exercising discretion must be presumed to rule impartially.

In Indiana the parties themselves decide on the merits and fairness of a motion to change the judge or county. As a result, the motion for a

56. The writer sent letters to twenty-four circuit and superior court judges and nine practicing attorneys in Indiana asking them whether they thought an automatic change of venue or judge was desirable as it exists in Indiana when a timely application is filed. Ten judges and six attorneys replied to the inquiry. Of these replies eleven indicated that Indiana's provisions for changing venue and judge are satisfactory, five found them unsatisfactory and undesirable and one expressed no opinion. Of the eleven in favor of our present provisions, seven were judges and four were attorneys. Four of those dissatisfied were judges and one was an attorney. One answering attorney expressed no opinion.

57. *Ibid.*

change of venue or change of judge has become a tactic which can be used by a party's lawyer to secure a delay or other advantage for his client. To assure a systematic and regular method of changing the county or the judge the court should be given the power or discretion to determine the legal sufficiency of the facts constituting the cause alleged. In an adversary system the judge must be able to rule on procedural motions presented by the parties in order to prevent utter chaos and confusion. Giving a party the absolute "right" to change the venue or change the judge is almost without precedent in the law.

Change of County and Change of Judge. Indiana's change of venue provisions include the concept of changing the judge, although in theory change of venue is limited to the concept of changing the place of trial. Indiana's provisions refer rather loosely to changes of venue from the county and changes of venue from the judge.[58] The statute is the result of an overlay of legislation which injected the new concept of change of judge into the old framework which had been used only to change the county.[59] Fortunately the method of selecting a special judge and the method of changing the county have been given separate attention under Indiana Supreme Court Rule 1-12 and 1-12B respectively. The provisions which deal with the right to change and the causes for change, however, should also make a clear distinction between a change of venue and a change of judge. If the two concepts were treated in separate statutes much mislabeling and misunderstanding among the users of these procedures could be alleviated.

Attention should also be given to existing provisions on change of county or change of judge which duplicate or conflict with each other. Certainly unnecessary provisions should be repealed. Much of the duplication stems from the confusion as to whether the legislature should act by statute or the court by its rule-making power, but, unfortunately this power conflict between the legislature and the judiciary may make a thorough and consistent handling of the area impossible.

Criminal Provisions. The Indiana criminal change of venue and change of judge provisions differ markedly from the civil provisions. On

58. Rule 1-12B tends to indicate that there is some hybrid form of procedure known as changing venue from the judge, since it reads "In all cases where the venue of a civil action may be changed from the judge. . . ." RULES SUP. CT. IND. 1-12B. Although 2-1401 specifies causes which can only be used to change the judge, namely causes one, two, six and seven, the introductory language of the section reads "The court . . . shall change the *venue* of any civil action. . . ." IND. ANN. STAT. § 2-1401 (Burns 1946) (emphasis added).

59. See generally Ind. Laws 1859, ch. 85, § 207.

60. See IND. ANN. STAT. § 9-1316 (Burns 1956).

application of the state[60] or the defendant,[61] the judge may be changed on the ground of his bias and prejudice. The trial court has no discretion in ruling on the application, even though the application is submitted after the statutory period for filing has lapsed.[62] Moreover, if the judge is related to a party, or if he was counsel in the case, he has a duty to appoint a special judge upon the motion of either party or upon his own motion, the timeliness of the motion again being irrelevant.[63] In contrast to a motion for a change of judge, a change of county may be had by either party only when the defendant exerts local excitement or prejudice.[64] It is significant to note, however, that when such a cause for a change of venue is alleged the court may exercise its discretion in granting the motion in all cases except those punishable by death.[65] Thus, it would appear that the criminal provisions for a change of venue have been more liberally construed than the corresponding civil provisions.

Although certain considerations in changing the venue or the judge in a criminal case may differ from those in a civil case, the policy in each case is to insure a litigant a fair trial before an impartial forum.[66] As a general proposition, therefore, it would seem wise, irrespective of the change of venue—change of judge system selected, to treat change of venue or judge uniformly in civil and criminal cases,[67] since consistent treatment could enhance the understanding of and facilitate the skillful use of the two procedures in Indiana.

The Time Limit for Change. Finally, rule 1-12B requires filing for a change of judge or county not later than ten days after the issues are first closed on the merits.[68] It is difficult to know when the issues have been closed if the pleadings are at all complex. Do the issues close after

61. See IND. ANN. STAT. § 9-1301 (Burns 1956).
62. Beck v. State, 171 N.E.2d 696 (Ind. 1961).
63. See IND. ANN. STAT. §§ 9-1303, -1304 (Burns 1956).
64. See IND. ANN. STAT. § 9-1301 (Burns 1956).
65. See IND. ANN. STAT. § 9-1305 (Burns 1956).
66. The Indiana criminal code study commission has recommended revisions in the change of judge provision designed to prevent the use of the motion to delay trials. See Indianapolis News, February 16, 1962, p. 1, col. 2 (Blue Streak); Indianapolis Star, March 4, 1962, sec. 2, p. 2, col. 1. See note 56, *supra*, indicating that certain judges and attorneys are concerned about the same abuse of Indiana's civil change of venue provisions.
67. Chief Justice of the Indiana Supreme Court, Harold E. Achor, has recommended the addition of Rule 1-12C which has been approved by the Advisory Committee on Rules. It is essentially the same provision as Rule 1-12B which applies to civil actions. This would be a major step toward uniform provisions in changing venue in both civil and criminal cases. See 6 RES GESTAE 18 (February, 1962).
68. Where the issues are closed without answer by operation of law, or where the case is remanded for a new trial by the appellate or supreme court, then filing must not be later than ten days after the party has knowledge the cause is ready to be set for trial. RULES SUP. CT. IND. 1-12B.

the defendant answers, and if so, what effect does a reply have?[69] The moving party may have difficulty selecting the proper time to apply for a change where there have been cross-complaints, demurrers, motions, or pleas in abatement. In fact, the moving party may control the closing of issues and hence the time for filing for a change of venue or judge, since it is possible for parties to purposely file replies or other pleadings to extend the time within which to move for a change of venue. It therefore seems desirable to have a clear time limit on a motion for a change so that a party cannot needlessly delay a final judgment. The time limit should be early in the proceedings so that the parties are all apprised of the venue and the judge. Since it would seem to disrupt a proceeding for one judge to preside over the closing of the issues and another judge to hear the trial, and since it would likewise appear that most causes for changing the venue or changing the judge are ascertainable prior to the closing of the issues on the merits, a time limit might be phrased so that it expired in a reasonable specific time after the complaint is filed.

CONCLUSION

It appears that the right to a fair trial, the primary objective of change of venue and change of judge statutes, would not be jeopardized if the trial judge were given discretion in ruling on the merits of the change motion. By permitting the trial judge to deny the motion when it is made without facts sufficient to constitute a legitimate ground for a change, the delay which is possible under the present mandatory interpretation of the civil provisions could be reduced to a minimum. In addition, the ability to consider the factual basis of a change motion would also make the absence of an affidavit of less importance in that the requirement of the affidavit would no longer be the only method by which baseless changes could be prevented.

In the interest of clarity and simplicity, it would also seem that motions for a change of judge and change of venue should be treated in separate provisions. They are distinctive theories and should not be confused. Similarly, the criminal and civil provisions for a change of judge and a change of venue should be revised so as to produce not only a uniform procedure but also to permit the judge in civil actions to exercise his discretion in ruling on a motion for a change of judge or change of venue. The grounds for the civil and criminal changes might necessarily be different and in the case of capital offenses a mandatory change

69. A motion is timely when filed ten days after replies are filed to defendant's affirmative allegations. State *ex rel.* Foreman v. Circuit Court 178 N.E.2d 901 (Ind. 1961).

might be desirable, but with these exceptions uniformity of the statutes would seem to facilitate their usefulness and understandability.

Finally, even if an absolute right to a change of venue remains a part of Indiana law a certain amount of delay could be avoided by shortening the time within which a motion for a change could be made. The present time limit is vague and as a consequence permits unnecessary delay in addition to the actual change delay.